No. 14-915

In The
# Supreme Court of the United States

REBECCA FRIEDRICHS, et al.,

*Petitioners,*

v.

CALIFORNIA TEACHERS ASSOCIATION, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF OF AMICUS CURIAE MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONERS

PATRICK J. WRIGHT
*Counsel of Record*
MACKINAC CENTER FOR PUBLIC POLICY
140 West Main Street
Midland, MI 48640
(989) 631-0900
wright@Mackinac.org

*Counsel for Amicus Curiae Mackinac Center for Public Policy*

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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## INTEREST OF AMICUS CURIAE[1]

The Mackinac Center for Public Policy is a Michigan-based, nonprofit, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

Michigan recently became a right-to-work state, and it is currently severing the link between exclusive representation and mandatory agency fees. The Mackinac Center has played a prominent role in studying and litigating issues related to mandatory unionism.

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[1] This brief is filed with the written consent of all parties. No counsel for a party authored the brief in whole or in part, nor did any person or entity, other than amicus curiae, its members, or its counsel, make a monetary contribution to the preparation or submission of this brief. The parties were given 10 days notice of the filing of this brief.

## ARGUMENT

### I. There is not an inextricable link between exclusive representation and an agency fee. This can be shown by circumstantial and empirical evidence from Michigan and the rest of the nation. Hence, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), was wrongly decided, and the decision should be overturned.

#### A. This Court's case law on the relationship between agency fees and exclusive bargaining in the public sector

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court held it was constitutional for public-sector unions to charge non-union-members a mandatory fee to defray the costs of contract negotiation and grievance administration related to a collective bargaining agreement that controlled the terms and conditions of the nonmembers' employment. In *Abood*, the defendant teachers union claimed that two private-sector cases, *Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956), and *Machinists v. Street*, 367 U.S. 740 (1961), provided a sufficient rationale for permitting such so-called "agency fees" in the public sector.

The plaintiff teachers argued that there were fundamental differences between private- and public-sector bargaining that would make *Hanson* and *Street* inapplicable. This Court recognized some of those differences. For instance, it was noted that: "A public employer, unlike his private counterpart, is not

guided by the profit motive and constrained by the normal operation of the market." *Abood*, 431 U.S. at 227. When combined with the general price inelasticity of "essential" municipal services, this dynamic will lead to increased labor costs: "Although a public employer, like a private one, will wish to keep costs down, he lacks an important discipline against agreeing to increases in labor costs that in a market system would require price increases." *Id.* at 228. For the same reason, "[a] public-sector union is correspondingly less concerned that high prices due to costly wage demands will decrease output and hence employment." *Id.*

A second difference discussed was that "decisionmaking by a public employer is above all a political process." *Id.* This Court explained:

> The officials who represent the public employer are ultimately responsible to the electorate, which for this purpose can be viewed as comprising three overlapping classes of voters[ – ]taxpayers, users of particular government services, and government employees. Through exercise of their political influence as part of the electorate, the employees have the opportunity to affect the decisions of government representatives who sit on the other side of the bargaining table. Whether these representatives accede to a union's demands will depend upon a blend of political ingredients, including community sentiment about unionism generally and the involved union in particular, the degree of

> taxpayer resistance, and the views of voters as to the importance of the service involved and the relation between the demands and the quality of service. It is surely arguable, however, that permitting public employees to unionize and a union to bargain as their exclusive representative gives the employees more influence in the decisionmaking process than is possessed by employees similarly organized in the private sector.

*Id.* at 228-29.

Despite recognizing the differences between collective bargaining in the public and private sectors, this Court permitted the use of public-sector agency fees on the same grounds adopted in *Hanson* and *Street* regarding the state's putative objectives of labor peace and the prevention of so-called free riders. A distinction was made between "political" spending, which could not be charged to the nonmember, and spending "germane to collective bargaining," which could be charged to the nonmember. *Abood*, 431 U.S. at 235-36. This Court recognized there would "be difficult problems in drawing lines between collective-bargaining activities, for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Id.* at 236.

The *Abood* holding began to be reexamined in *Knox v. Service Employees*, 132 S.Ct. 2277 (2012). This Court stated that agency fees "constitute a form of compelled speech and association that imposes a

'significant impingement on First Amendment rights.'" *Id.* at 2289 (citation to internal quotation omitted). It was noted that free-rider arguments are "generally insufficient to overcome First Amendment objections." *Id.* This Court explained that acceptance of the concept of "labor peace" to justify "compelling nonmembers to pay a portion of union dues" was an "anomaly." *Id.* at 2290.

In *Harris v. Quinn*, 134 S.Ct. 2618 (2014), this Court considered whether *Abood* should be extended to allow the imposition of agency fees on personal care providers who were considered less than "full-fledged state employees." *Id.* at 2638. The holding discussed *Abood*'s shortcomings at length.

One such shortcoming was a failure to recognize that discussions of wages and benefits "are important political issues" in the public sector, but "generally not so in the private sector." *Harris*, 134 S.Ct. at 2632.[2] Further, in the private sector, a union bargains

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[2] Spending on public-sector wages and benefits is a legitimate public concern. According to the Department of Commerce's Bureau of Economic Analysis, state and local governments spent around $1.3 trillion on compensation in both 2012 and 2013. (To obtain this figure, go to http://www.bea.gov/regional and click on "State Annual Personal Income & Employment" under the heading "Data." On the new page, click on the link "Compensation of employees by industry (SA06, SA06N)"; choose "NAICS (1998 forward)"; and click "Next Step." Choose "United States" under the heading "Area"; choose "Levels" under the heading "Units of Measure"; choose "State and local" under the heading "Statistic"; and click "Next Step." On the new page, choose either 2012 or 2013 and again click

(Continued on following page)

with the employer and lobbies the government, while in the public sector, a union both bargains with and lobbies the government. *Id.* Hence, in the public sector, a union's contract negotiations inevitably constitute political speech.

A second shortcoming was the contention that exclusive representation requires agency fees: "[A] critical pillar of the *Abood* Court's analysis rests on an unsupported empirical assumption, namely, that the principle of exclusive representation is dependent

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"Next Step." In each year, the figure rounds off to $1.3 trillion. To view the page that results when these choices have been made with "All Years" selected on the final screen, go to http://tinyurl.com/kx5dqwm.)

According to the U.S. Census Bureau's "2012 Census of Governments: Finance – State and Local Government Summary Report," state and local governments spent $3,151,702,715 for the year. http://www2.census.gov/govs/local/summary_report.pdf at 8. Dividing the wage information from the previous paragraph by total expenditures yields a rough estimate that 42% of state and local government spending involves public employees' wages and benefits. Both this percentage and the raw spending are large enough to make the wages and benefits of state and local government employees a significant public concern.

In *Harris*, this Court discussed another concern related to public-employee compensation: the underfunding of Illinois' pension system. *Harris*, 134 S.Ct. at 2632, n. 7. According to state of Michigan calculations, the Michigan Public School Employees' Retirement System is $25.8 billion underfunded. The system generally covers the pensions of around 200,000 retirees and 200,000 current employees of the state's conventional public school districts and community colleges. http://www.mackinac.org/archives/2015/MPSERS%20Actuarial%20Valuation%202013%20-%20Pension.pdf at D-1; Table A-1 line 9.

on a union or agency shop." *Harris*, 134 S.Ct. at 2634. This Court explained:

> A union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked. For example, employees in some federal agencies may choose a union to serve as the exclusive bargaining agent for the unit, but no employee is required to join the union or to pay any union fee. Under federal law, in agencies in which unionization is permitted, "[e]ach employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right." 5 U.S.C. § 7102 (emphasis added).[22]
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> [22]A similar statute adopts the same rule specifically as to the U.S. Postal Service. See 39 U.S.C. § 1209(c).

*Harris*, 134 S.Ct. at 2640.

The *Harris* dissenters recognized that the majority's logic imperiled *Abood* "as to all public employees." *Id.* at 2651 (Kagan, J., dissenting). The *Harris* dissenters attempted to defend the link between exclusive representation and agency fees. While recognizing that free-riding arguments usually fail, it was noted there is "an essential distinction between unions and special-interest organizations generally." *Id.* at 2656. This point was elaborated upon:

> The law compels unions to represent – and represent fairly – every worker in a bargaining unit, regardless whether they join or contribute to the union. That creates a collective action problem of far greater magnitude than in the typical interest group, because the union cannot give any special advantages to its own backers. *In such a circumstance, not just those who oppose but those who favor a union have an economic incentive to withhold dues; only altruism or loyalty – as against financial self-interest – can explain their support.* Hence arises the legal rule countenancing fair-share agreements: *It ensures that a union will receive adequate funding, notwithstanding its legally imposed disability – and so that a government wishing to bargain with an exclusive representative will have a viable counterpart.*

*Id.* at 2656 (emphasis added). The dissenters then questioned whether the personal care providers union would survive without agency fees and pointed to federal unions to show that high levels of support are not guaranteed:

> Still, the majority too quickly says, it has no worries in this case: Given that Illinois's caregivers voted to unionize, "it may be presumed that a high percentage of [them] became union members and are willingly paying union dues." But in fact nothing of the sort may be so presumed, given that union supporters (no less than union detractors) have an economic incentive to free ride.

> See supra, at 2656-2657. The federal workforce, on which the majority relies, see ante, at 2640, provides a case in point. There many fewer employees pay dues than have voted for a union to represent them.[7] And why, after all, should that endemic free-riding be surprising? *Does the majority think that public employees are immune from basic principles of economics? If not, the majority can have no basis for thinking that absent a fair-share clause, a union can attract sufficient dues to adequately support its functions.*
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>
> [7]See, e.g., R. Kearney & P. Mareschal, Labor Relations in the Public Sector 26 (5th ed. 2014) ("[T]he largest federal union, the American Federation of Government Employees (AFGE), represented approximately 650,000 bargaining unit members in 2012, but less than half of them were dues-paying members. All told, out of the approximately 1.9 million full-time federal wage system (blue-collar) and General Schedule (white-collar) employees who are represented by a collective bargaining contract, only one-third actually belong to the union and pay dues.").

*Id.* at 2657 (emphasis added). Thus, the dissenters defended public-sector agency fees as the only way a union could remain a viable exclusive representative in collective bargaining with the government.

This view can be tested. The constitutional remedy sought here – permitting exclusive representation while prohibiting agency fees – has the same

practical effect as a state right-to-work law in the private sector.[3] The measurable consequences of right-to-work laws permit us to evaluate the dissent's theory.

### B. Michigan's Right-to-Work Law and the Michigan Education Association

The Michigan Education Association (MEA) is a high-profile, influential teachers union similar to the California Teachers Association, the lead Respondent in the instant case. For years, the MEA has been Michigan's largest public-sector union. In 2012, its membership included 117,265 public school teachers and support staff.[4]

That same year, the state of Michigan passed 2012 Mich. Pub. Act 349, a public-sector right-to-work

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[3] In contrast, the labor law governing public workers in the states is quite varied. Many public-sector unions lack one of the three elements needed to test the *Harris* dissenters' theory: (1) exclusive representation; (2) the duty of fair representation; and (3) lack of an agency fee.

[4] This figure is based on calculations using data from Schedule 13 of the MEA's 2012 federal LM-2 form. The LM-2 is an annual financial report that labor organizations are required to file with the Office of Labor Management Standards. See generally, 29 C.F.R. § 403.2. LM-2s can be found at http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm. On that page, click on "union search." The MEA file number is "512-840." The next page that appears will be a "Result Set" page with the MEA's 2014 LM-2. By clicking on "National Education Asn Ind State Association" the MEA's LM-2s from 2000 to 2014 will appear. See also Appendix, Table A.

law that would become effective on March 28, 2013.[5] The MEA's subsequent experience with that law, which it vehemently opposed, has drawn significant attention both locally and nationally.

Part of this interest is driven by the three circumstances described in the *Harris* dissent: the MEA's power of exclusive representation, its duty of fair representation, and its inability to collect agency fees. Interestingly, the public positions taken by several of the union's high-ranking officials cast doubt on the economic arguments made by the dissenting Justices in *Harris*.

The departure began in October 2013, when the MEA made news statewide with its announcement that despite Michigan's recent right-to-work law, 99% of its membership had decided to stay with the union. http://www.mea.org/99-members-remain-mea-much-chagrin-opponents-public-education. The MEA reported on MEA President Steve Cook's October speech to the union's governing body. Cook discussed the significance of the union's high retention rate:

> Some predicted it was the end of organized labor in Michigan – that it would never survive. Some emails to me said it was foolish to even try to retain members – tens of thousands were waiting to leave. . . [But] 99

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[5] Contemporaneously, the Michigan Legislature passed 2012 Mich. Pub. Act 348, which established a right-to-work law for Michigan's private sector.

> percent of the MEA membership said, "No, thank you." They stayed with the organization that protects and respects your profession and the important role you play in educating students.

*Id.*

Several days later, Cook again discussed the subject on the public affairs TV show "Off the Record." In a follow-up interview posted to the Internet as "Off the Record OVERTIME," Cook made two points germane to the *Harris* dissent. In one, he identified the members' financial self-interest as remaining *in* the union – not leaving – and he regarded this as a source of the union's strength:

> MODERATOR: Put the 99 percent then in perspective. What does it mean?
>
> STEVE COOK: I think it means this association is not nearly as weak and impotent as some would, either inside the association or certainly outside, would have us believe. I think this association has tremendous value for its members, and that's why the members stayed with it.

https://www.youtube.com/watch?v=-y4N3XUfy5Y. Clearly, Cook felt confident in asserting the union was strong despite the loss of agency fees and that it had professional value for its members. He made no appeals to "altruism" or blind "loyalty."

His second point related to the experience of the United Auto Workers, another large, high-profile, and

influential union with a significant Michigan presence. Cook related a discussion he had with Bob King, then the head of the UAW, concerning the auto union's experience in right-to-work states:

> MODERATOR: Let's take you back to the year. Were you surprised by the 1% figure of people that dropped out because of right-to-work? Did that surprise you?
>
> STEVE COOK: Well, not really, because I wouldn't have been surprised if we'd lost any, but we just didn't know. I mean, we had no idea.
>
> MODERATOR: What was your worst fear?
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> STEVE COOK: Worst fear was thousands. That's everybody's worst fear. I mean, I can remember talking to Bob King shortly after that. I said, "Well, Bob, in your right-to-work states, how many do you generally get?" And he says, "Ah, we retain 94, 95%." Well, that's not bad, you know, but we just had no idea.

*Id.*[6] King's statement implied that losses of membership could be modest and capped – a view the MEA leadership later adopted, as will be seen below.

Several weeks later, another MEA official made a comment relevant to the *Harris* dissent. In this case, Doug Pratt, the MEA's director of member and political engagement, undermined the dissent's assertion

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[6] The audio for this discussion can be found at 3:04 to 3:42.

that a union cannot bear the burden of exclusive representation without an agency fee. In testimony before a state Senate Committee, Pratt was asked whether, in light of the state's new right-to-work law, the MEA would prefer to represent only those who chose to be members – in other words, to forgo the union's exclusive bargaining power in exchange for relief from the "disability" imposed by the duty of fair representation. Pratt indicated that the MEA would prefer to remain the exclusive bargaining agent despite the recent loss of agency fees:

> SENATOR MEEKHOF: None of you have used this word that I'm going to use next, but just as a general question: Sometimes I've heard people referred to who left the union or who want to leave the union as freeloader. Is there any contention in the MEA, do you wish to be relieved of representing those people that are opting out of the union?
>
> DOUG PRATT: (pause) No. I think as was discussed a year ago when PA 349 came about. This is an issue that brings about strong feelings. It brings about divisiveness. It is what it is. But we believe in collective bargaining, and we believe in the democratic process. We believe in majority rule. And those are things that involve insuring that we represent everybody within the unit under the law. And as you are aware, there is a difference between what someone gets under a contract that's negotiated. We live up to those contracts. We have a responsibility to anybody who is employed within a bargaining

> unit that we represent to represent them in good faith, and we do so. . . :

https://www.youtube.com/watch?v=OHhTPkoZ-dU&feature=youtu.be. His response suggests that whatever "disability" fair representation might impose, it does not necessarily override a union's desire to obtain and preserve exclusive representation.

If one accepts the *Harris* dissenters' "basic principles of economics," it is difficult to understand how the MEA would maintain its commitment to exclusive representation even as a legislator – however hypothetically – was entertaining the idea of removing the "disability" of fair representation. The economics of unionization appear to be more nuanced and complex than the dissenters assert.

No doubt the union would prefer to have both exclusive representation and an agency fee. Nevertheless, Pratt's response implies the union would provide exclusive representation – and thereby advance the state objective of labor peace – without benefit of an agency fee.

As the MEA entered its second year under Michigan's right-to-work law, there were several reasons to believe the union would experience additional losses in membership. To begin with, the MEA had long contended that its members could resign from the union only during the month of August in any given year. August 2013 therefore provided the first opportunity that MEA members had, in the union's view, to end both their membership and financial support of

the union. The union, however, postponed publicizing this fact to its membership until September 2013.[7]

By August 2014, however, the significance of this "August window" was much more widely understood by the union's membership. Following the MEA's actions regarding member resignations in 2013, amicus curiae, among others, engaged in a sustained informational campaign to educate MEA members about the union's resignation procedures before the next August window arrived.[8]

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[7] Doug Pratt's testimony, quoted earlier, was provided during December 2013 Michigan Senate hearings prompted by legislative concern over the union's procedures for allowing members to withdraw. During that hearing, Pratt made no apologies for the MEA's not actively informing its members about the procedures for resigning and exercising their new ability to withhold financial support from the union:

> DOUG PRATT: Why would any membership organization, without knowledge that someone wanted to leave, seek those people out? The fact is that membership organizations like ours don't market how to quit. They market why you should stay. And just like any other membership organization, MEA must constantly demonstrate what we bring to the table – why membership matters for the school employees we represent. We took that responsibility to heart before PA 349, and we continue to do so today. Furthermore, our resignation process is not a secret. It's on our continuing membership form. It's our first organizational bylaw available online. Anyone who asked about resigning was told about the process.

https://www.youtube.com/watch?v=l3oNlDNQV2g.

[8] https://augustoptout.org/.

Moreover, public confusion over another dues-related law had abated. This law, 2012 Mich. Pub. Act 53, had prohibited school districts from collecting dues and fees from school employees' paychecks. Many workers had assumed that by not signing up for the MEA's alternative dues-payment plan, they were exercising their choice under the state's right-to-work law to end their financial support of the union. Later litigation over the MEA's August window showed that thousands of members may have been confused in this way. *In re Saginaw Education Association (Eady-Miskiewicz et al.)*, Case No. CU13 1-054 (September 2, 2014) at 12.

In September 2014, the MEA announced that it had indeed lost members, but also noted that "more than 95 percent of our members stayed. This August, less than 5,000 members left the MEA out of about 110,000 active members."[9] A couple months later, another MEA official told the Detroit Free Press the union's membership had stabilized:

> Nancy Knight, director of communications and public policy for the Michigan Education Association, said the union's membership decline came after an intense, summer-long campaign waged by the Mackinac Center [amicus curiae] that targeted the union's members.

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[9] http://www.mea.org/mea-statement-august-window-merc-rulings.

> "We feel that all of those members that intended to leave did leave," Knight said. "We do not anticipate a future decline in membership."

http://www.freep.com/story/money/business/columnists/2015/01/23/union-membership-michigan-right-work-fall-state/22219305/. Knight's prognosis may be optimistic given that many school employees are still covered under grandfathered contracts with agency-fee clauses that have yet to expire.[10] Nevertheless, it appears MEA leaders believe the worst is behind them.

Of course, it's reasonable to wonder whether the MEA has been underreporting its losses in order to avoid bad public relations. A review of the union's federal LM-2 forms, however, provides no clear evidence that this is the case. The union's federal LM-2 form shows that the MEA's membership, at roughly 108,000 in 2014, was down around 10,000 members between 2012 and 2014 – a decline of 8.0%. This is somewhat more than the 6,500 members – 1,500 in 2013, and 5,000 in 2014 – that the union publicly announced as its net losses during that period due to the right-to-work law. The 3,500-member difference, however, may be attributable to a long-term decline in the MEA's membership independent of the effects of right-to-work. Two major factors in this decline are

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[10] An "agreement, contract, understanding, or practice that takes effect or is extended or renewed after March 28, 2013" would trigger the agency-fee ban. Mich. Comp. Laws § 423.210(5).

the steady drop since 2004 in the number of Michigan children attending public schools[11] and the increase in the number of districts privatizing the provision of major school support services.[12] Table A (see the Appendix) shows the change in MEA membership and dues- and fees-related income reported on the union's LM-2 forms from 2005 through 2014.

Ultimately, then, there is no sign that Cook, Pratt, and Knight – leading MEA officials – share the *Harris* dissenters' view that their union is doomed to insolvency due to the "financial self-interest" of its members; that their union will be unable to remain a "viable counterpart" at the bargaining table due to the "disability" of fair representation; and that their union will experience an inexorable loss of membership. Rather, they maintain the opposite. If they are correct, the MEA will continue to play its role as a viable exclusive representative in the statutory scheme chosen by the state of Michigan to advance labor peace.

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[11] http://www.senate.michigan.gov/sfa/Departments/DataCharts/DCk12_PupilHistory.pdf.

[12] http://www.mackinac.org/archives/2014/S2014-05.pdf at 3 (In Michigan, "contracting out increased from 31.0 percent of school districts in 2001 to 66.6 percent of school districts in 2014.").

### C. National numbers related to union membership

The last section dealt with the experience of a single – albeit large and politically important – union over a couple years. But this Court is being asked to create a rule that will apply to all U.S. public-sector unions for years to come. It makes sense therefore to broaden the analysis to encompass all U.S. unions that have experienced a loss of agency fees.

One counterintuitive constraint is necessary, however: the analysis must focus on private-sector unions. The reason is simple. Testing the hypothesis of the *Harris* dissenters requires a review of unions that possess both exclusive representation and a duty of fair representation. The overwhelming majority of private-sector unions meet these criteria. Public-sector unions, in contrast, vary widely in their control over representation, with some, such as those in Michigan, having a power of exclusive representation, and others, such as those in Virginia, having only the power to meet and confer with public employers on behalf of members who have voluntarily joined.

The data on union membership and worker representation comes from the U.S. Bureau of Labor Statistics, which describes itself as "the principal Federal agency responsible for measuring labor market activity, working conditions, and price changes in the economy." http://www.bls.gov/bls/infohome.htm. "The data on union membership are collected as part of the Current Population Survey (CPS), a

monthly sample survey of about 60,000 households that obtains information on employment and unemployment among the nation's civilian noninstitutional population age 16 and over."[13] The BLS indicates comparable data exists back to 1983. *Id.*

Using BLS data, private-sector union membership rates among union-represented workers from 2000 through 2014 were compiled for three categories of states: (1) states that never had right-to-work laws during that period ("agency-fee states"); (2) states that have had right-to-work laws during that entire period; and (3) Indiana, Oklahoma, and Michigan, each of which has adopted a right-to-work law since 2000.[14] To calculate the membership rate for a set of states in a given year, the number of union members in those states was divided by the number of workers under a union contract.

In states with agency fees over the 14-year period, roughly 93% of union-represented private-sector employees, on average, were full union members. In mixed-status states over the 14-year period, about 94% of union-represented private-sector employees, on average, were full union members, while

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[13] http://www.bls.gov/news.release/union2.nr0.htm.

[14] 2012 Mich. Pub. Act 348; 2012 Mich. Pub. Act 349; 2012 Ind. Legis. Serv. P.L. 2-2012; and Okla. Const. art. 23, § 1A (passed September 2001). The Mackinac Center's compiled statistics based on this data can be found at the following link: http://www.mackinac.org/21020.

in right-to-work states over the 14-year period, about 84% of union-represented private-sector employees were full union members.[15] (See Appendix, Table B.)

In other words, the right-to-work percentages ran lower than those of the agency-fee states, but only about 9 percentage points lower. In addition, the percentages for all three groups varied only a little over the period. There is a faintly detectable downward trend for each of the three groups, but it is hard to see this as a manifestation of the dynamic described in the *Harris* dissent. To begin with, the decline occurs in agency-fee states, not just right-to-work states, suggesting the cause was something other than the purported financial self-interest of free riders. In addition, the lowest point reached by the right-to-work states was about 81%, meaning the vast majority of covered workers remained union members. Such unions do not seem in danger of losing viability.

Of course, it is possible that tracking percentages, rather than actual union membership numbers, masks an underlying decline. Have right-to-work states maintained this roughly 84% rate of member support for private-sector unions even as union membership and union representation have been in the inexorable decline predicted by the dissenters in *Harris*?

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[15] See Appendix, Table B.

BLS data indicate that the answer is no. From 2000 to 2014, the total number of private-sector union members and union-represented workers in right-to-work states showed a slight net decline, but generally hovered around 1.4 million and 1.7 million, respectively. The persistent magnitude of these worker populations, coupled with the relatively stable rate of 80-plus percent union membership among union-represented workers, renders untenable the *Harris* dissenters' hypothesis about the basic economic principles that operate in the absence of agency fees. Unions are in fact able to fulfill the duty of fair representation despite whatever incentive workers might have to "free ride" on the union when they do not face any agency fees. A financially destructive membership exodus is not inevitable after all.

In fact, on the heels of *Harris*, one UAW organizer indicated he *preferred* to establish unions in right-to-work environments:

> Gary Casteel, the Southern region director for the United Auto Workers, says he prefers right-to-work environments for organizing.
>
> "This is something I've never understood, that people think right to work hurts unions," Casteel said in February. "To me, it helps them. You don't have to belong if you don't want to. So if I go to an organizing drive, I can tell these workers, 'If you don't like this arrangement, you don't have to belong.' Versus, 'If we get 50 percent of you,

> then all of you have to belong, whether you like to or not.' I don't even like the way that sounds, because it's a voluntary system, and if you don't think the system's earning its keep, then you don't have to pay."

http://www.washingtonpost.com/blogs/wonkblog/wp/2014/07/01/why-harris-v-quinn-isnt-as-bad-for-workers-as-it-sounds/.[16]

It seems likely that public-sector unions would be able to achieve the viability that private-sector unions have demonstrated in a right-to-work environment. True, there are clear differences between the private- and public-sector union environments, but these differences tend to ease the pressure on public-sector unions. As this Court acknowledged in *Abood,* cost discipline is less likely in the public sector; government workers face fewer competitive threats in the market for their service; and public-sector unions are uniquely empowered through the election process to influence the public employers with whom they bargain. These dynamics would generally make it easier for a public-sector union to remain financially solvent in the face of a "free-rider" problem.

As noted above, the union membership data dates back to 1983. *Abood* was decided in 1977. It is understandable that in 1977, this Court was forced to make its best guess about what would happen to

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[16] Casteel was recently elected Secretary-Treasurer of the UAW. http://www.uaw.org/page/uaw-secretary-treasurer-gary-casteel.

unions without agency fees. Now we have more than three decades of information, however. The data clearly show that unions can succeed without agency fees; the implicit concern from *Abood* that union would necessarily fail was misplaced.

## CONCLUSION

For the reasons stated above, this Court should grant certiorari and overrule *Abood*.

Respectfully submitted,

PATRICK J. WRIGHT
*Counsel of Record*
MACKINAC CENTER FOR
PUBLIC POLICY
140 West Main Street
Midland, MI 48640
(989) 631-0900
wright@Mackinac.org

*Counsel for Amicus Curiae*
*Mackinac Center for Public Policy*

## APPENDIX

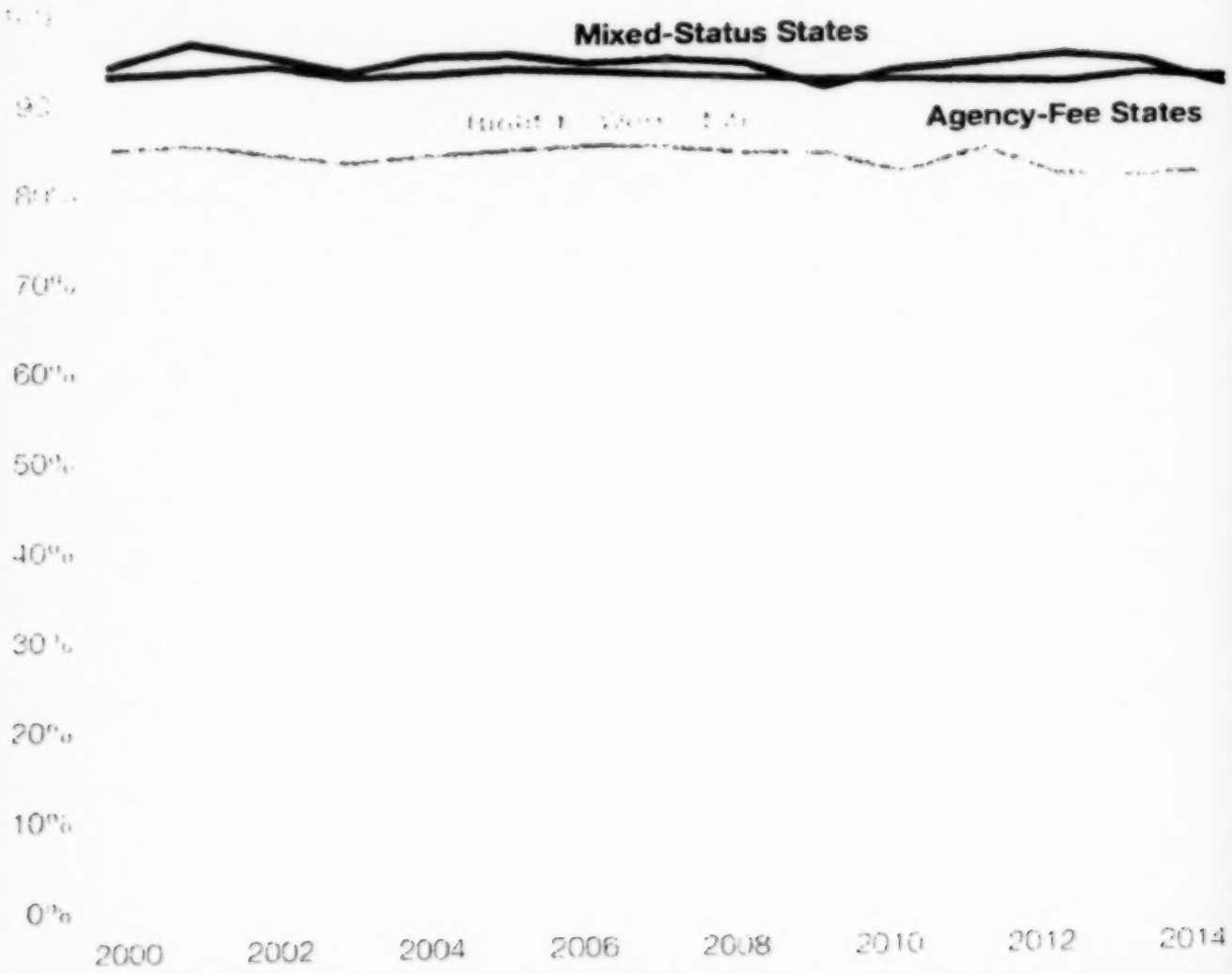
In Table A, the "Teacher Members," "Support Staff Members" and "Fee Payers" data are from Schedule 13 of the LM-2; the MEA uses the EA designation for teachers and the ESP designation for support staff, such as custodians, secretaries, cafeteria workers, and bus drivers. The "Fee payers" are the number of employees within the bargaining units who have chosen fee-payer status. Finally, the "Dues/fees collected" column is from Statement B, line 36, of the LM-2.

**TABLE A**

| The Michigan Education Association: Members, Fee Payers, and Related Income, Fiscal Years 2005-2014 | | | | | |
|---|---|---|---|---|---|
| Year | Teacher Members | Support Staff Members | Total Teacher and Support Staff Members | Fee Payers | Dues/Fees Collected |
| 2014 | 78,924 | 28,944 | 107,868 | 483 | $56,691,409 |
| 2013 | 81,571 | 31,576 | 113,147 | 582 | $64,381,493 |
| 2012 | 84,031 | 33,234 | 117,265 | 606 | $61,895,814 |
| 2011 | 86,135 | 34,210 | 120,345 | 587 | $62,794,268 |
| 2010 | 89,599 | 36,462 | 126,061 | 669 | $65,533,634 |
| 2009 | 90,835 | 36,744 | 127,579 | 624 | $66,322,937 |
| 2008 | 89,236 | 37,018 | 126,254 | 628 | $66,574,547 |
| 2007 | 89,272 | 37,131 | 126,403 | 734 | $66,655,566 |
| 2006 | 90,792 | 37,130 | 127,922 | 685 | $63,280,429 |
| 2005 | 92,207 | 38,675 | 130,882 | 683 | $64,292,138 |

## TABLE B

**Percentage of Union Members Among Private-Sector Workers Represented by a Union in Right-to-Work, Agency-Fee, and Mixed-Status States,* 2000-2014**

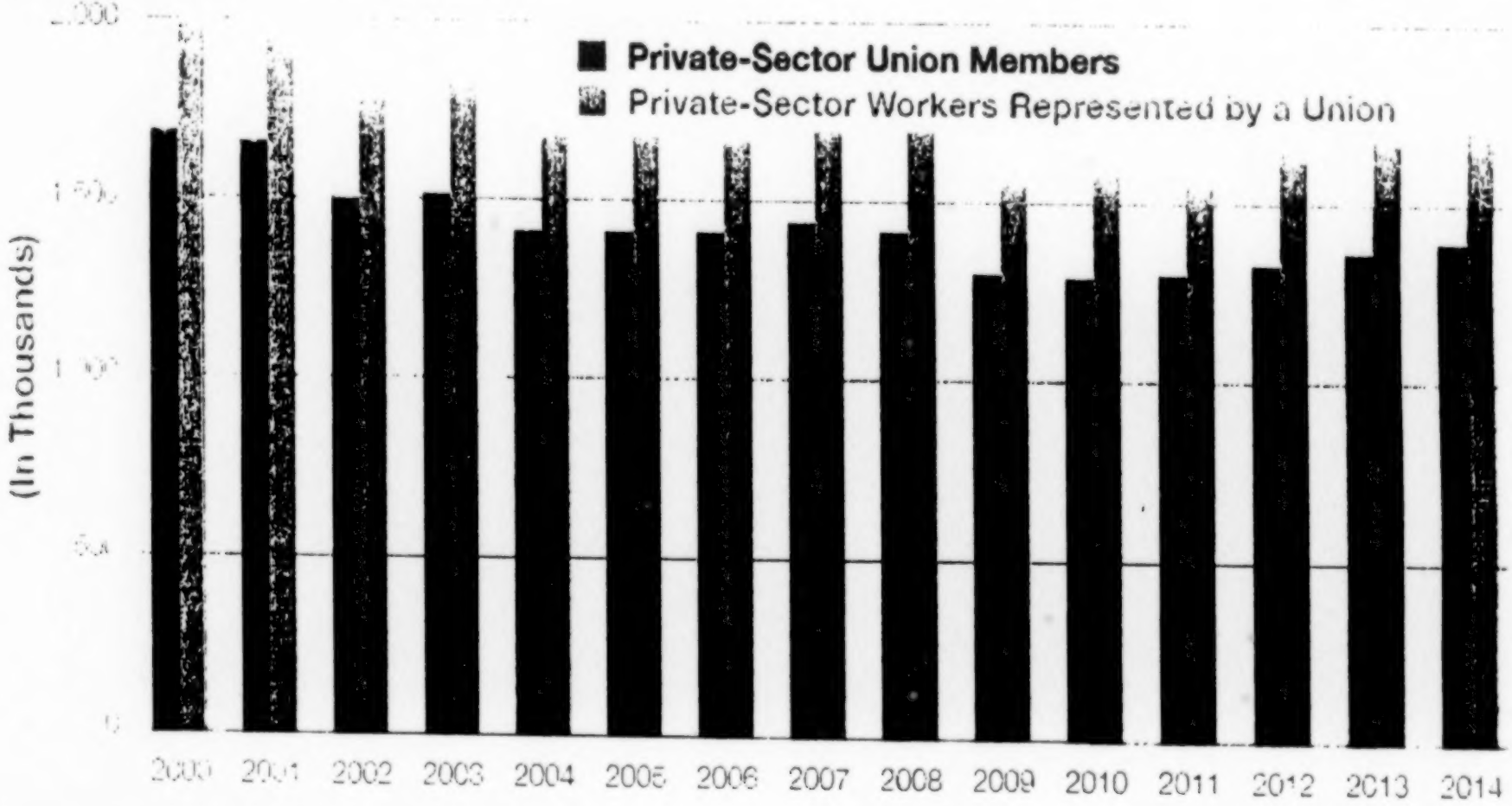



* The mixed-status states are Michigan, Indiana, and Oklahoma, each of which became a rig to-work state between 2000 and 2014.

*Source: Calculations based on data from Unionstats.com.*

**TABLE C**

**Private-Sector Union Members and Represented Workers in Right-to-Work States, 2000-2014**




*Source: Calculations based on data from Unionstats.com*

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